United States Court of Appeals

for the Second Circuit

REPLY BRIEF

ORIGINAL

76-4111

United States Court of Appeals
For the Second Circuit

JORGE ANTONIO MELARA-ESQUIVEL,
Petitioner,

v.

IMMIGRATION & NATURALIZATION SERVICE,
Respondent.

B
P/S

PETITIONER'S REPLY BRIEF

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-against-

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PETITIONER'S REPLY BRIEF

I

THE STREET DETENTION AND INTERROGATION OF PETITIONER CLEARLY VIOLATED THE 4TH AMENDMENT

On August 17, 1976, the United States Court of Appeals for the 7th Circuit, in a landmark decision, affirmed the decision of the United States District Court for the Northern District of Illinois in *Illinois Migrant Council v. Pilliod*, 398 F. Supp. 882 (N.D. Ill. 1975) (Court of Appeals Case No. 75-2019). The *Illinois Migrant Council Case*, which is discussed in detail in petitioner's brief in chief, involved the preliminary injunction of Immigration Service "Area Control Operations", and random street interrogations of exactly the kind to which the petitioner herein was subjected. These street encounters are described in detail in the opinion of the

District Court, and on pages 2 and 3 of the decision filed by the Court of Appeals.

The Court of Appeals agreed wholeheartedly with the determination of the District Court to preliminarily enjoin the Immigration and Naturalization Service from:

> "arresting, detaining, stopping, and interrogating or otherwise intefering with plaintiffs or any person of Mexican ancestry or of a Spanish surname who is, will be or has been lawfully present in the Northern District of Illinois, unless they possess a valid warrant to search or arrest such person, have probable cause to search or arrest such person without such a warrant, or have reasonable suspicion based on specific articulable facts that such person is an alien unlawfully in the United States." (Court of Appeals Opinion at page 5)

In its opinion, the Court of Appeals stated:

> "The District Court held, and we agree, that a street stop is justifiable here only when the INS agent has a "reasonable suspicion based on specific articulable facts that such a person is an alien unlawfully in the United States. *United States v. Brignoni-Ponce, supra,* 422 U.S. at 884. Defendants argued that this standard is contrary to law. However, this standard is substantially embodied in a 1969 INS guideline, but unfortunately, it is not being followed by INS officers in the field. 398 F. Supp. at 902, 903." (Opinion at page 10)

The Court also noted that the recent decision of the United States Supreme Court in *United States v. Martinez-Fuerte,* 44 L.W. 5336, which involved stopping of automobiles at fixed check points, did not require a different result. The Court further stated:

> "In accord with the Court of Appeals for the District of Columbia, we hold that when the in-

> dividual is detained against his will for questioning, the INS agents must have a reasonable suspicion that he is an illegal alien. *Au Yi Lau v. INS*, 445 F. 2d 217, 223 (D.C. Cir. 1971), Cert. denied, 404 U.S. 864.

We submit that the record of proceedings clearly establishes that the street interrogation and detention of respondent were *prima facie* invalid under the standards laid down by *Illinois Migrant Council* and the other cases cited by petitioner. If there *were*, in fact, articulable facts creating a reasonable suspicion of illegal alienage which prompted the arresting officer to follow, detain, and interrogate respondent on a public street, that officer should have been present at the hearing to so testify. In the absence of such testimony, or any other evidence on the part of the Immigration Service to demonstrate the lawfulness of its conduct, any finding that the arrest of respondent was lawful, would have to be based on pure speculation.

Petitioner's pre-filed motion and affidavit clearly made on *prima facie* case, and placed the Government on notice of the fact that a challenge was being directed to the lawfulness of petitioner's arrest. Under the procedures which the Board of Immigration Appeals itself has laid down in *Matter of Tsang*, Interim Decision 2187 (BIA, Feb. 16, 1973), and *Matter of Tang*, 13 I & N Dec. 691 (BIA, April 22, 1971), which procedures are similar to "the rule which has been adopted in criminal cases", the Immigration Service should have been required to come forward with evidence concerning the manner of petitioner's arrest upon his prima facie demonstration of illegality.

II

THE EXCLUSIONARY RULE MUST BE APPLIED IN DEPORTATION PROCEEDINGS

In its brief filed herein, the Government puts forward the contention that the exclusionary rule should not be applied in deportation proceedings because they are "Civil" in nature. Such position is unquestionably contrary to law.

It is now well established that the same exclusionary rule which applies to criminal proceedings also applies to deportation proceedings. *Yam Sang Kwai v. INS*, 411 F. 2d 683, 694 (D.C. Cir.), cert. denied, 396 U.S. 877 (1969); *Illinois Migrant Council v. Pilliod, supra*, 398 F. Supp. at 897-98; *United States v. Wong Quong Wong*, 94 Fed. 832 (D. Vt. 1899). See, also *Bong Youn Choy v. Barber*, 279 F. 2d 642, 646 (9th Cir. 1960); *Klissas v. INS*, 361 F. 2d 529 (D.C. Cir. 1966); *La Franca v. INS*, 413 F. 2d 686 (2d Cir. 1969); *Cheung Tin Wong v. INS*, 468 F. 2d 1123 (D.C. Cir. 1972); *Au Yi Lau v. INS*, 445 F.2d 217 (D.C. Cir. 1971).

The rationale supporting the application of the suppression rule to deportation proceedings is clear: "aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law." *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953). The Supreme Court in *Mapp v. Ohio*, 367 U.S. 643 (1961), expressly held that "due process of law" includes the right to protection against unreasonable searches and seizures, enforced by means of exclusion from the illegally seized evidence. The *Mapp* decision unquestionably stands for the proposition that the traditional standards of fairness encompassed in due process of law include the exclusionary rule for the enforcement of the Fourth Amendment.

In *United States ex. rel. Bilokumsky v. Tod*, 263 U.S. 149, 158 (1923), although the Court held that the involved alien's confession was not coerced, it clearly indicated that it would not uphold a deportation proceeding lacking an element essential to due process of law. There is now no question that present day concepts of due process of law clearly include the Fourth Amendment exclusionary rule.

Directly on point is a group of cases in the District of Columbia Circuit, *Yam Sang Kwai v. INS*, supra; *Au Yi Lau v. INS, supra; Cheung Tin Wong v. INS, supra.* In all of these cases, the Court found the arrests in question to be proper only after a lengthy analysis of the record. Clearly, the Court considered that illegally seized evidence would *not* be admissible, because if it did not hold such view, there would be no purpose in its determining on a case by case basis whether the stops and arrests by INS agents were lawful. It is especially clear that the Court proceeded on that basis in *Cheung Tin Wong, supra,* since the Court expressly found it necessary to reserve decision on the question of whether other documentary evidence, unconnected to an illegal arrest could be used against an alien. 468 F. 2d at 1124.

On the basis of all of the above, it is clear that the Government's contention that illegally obtained evidence need not be suppressed in a deportation proceeding is clearly untenable. Carrying the Government's proposition to its logical conclusion, Immigration Officers would be free to violate the constitutional rights of the public as a whole with impunity. Mass detentions would be permitted to take place on city streets and subway stations; people's homes could be broken into and the occupants therein interrogated, with all of the evidence obtained thereby freely admissible in deportation proceedings. The only sanctions which could be legally imposed against such conduct would be cumbersome injunction proceedings of the sort involved in *Illinois Migrant Council, supra;*

damage actions against involved Government agents of the sort involved in *Bivens v. Six Unknown Named Agents*, 40[illegible] U.S. 388 (1971); and motions to suppress evidence, in the unlikely event that the Government sought to bring *criminal* proceedings instead of, or in addition to, deportation proceedings. At this stage at the development of constitutional law, such a result would be unthinkable.

What we wish to emphasize, is that the application of the exclusionary rule in deportation proceedings, while incidentally benefiting a handful of deportable aliens, largely serves to protect the general public — American citizens and lawful permanent resident aliens alike — from improper and unconstitutional harassment by the governmental agency charged with enforcement of the Immigration laws.

III

THE EVIDENCE USED TO ESTABLISH DEPORTABILITY CONSTITUTED FRUITS OF THE VIOLATION OF PETITIONER'S CONSTITUTIONAL RIGHTS.

In its brief filed herein, the Government attempts to dispute the contention made by petitioner that the material culled from service files following his arrest and interrogation, constituted the fruits of that arrest and interrogation. With absolutely no support in the record, the Government contends that the information used to substantiate deportability could also have been obtained as a result of petitioner having "voluntarily" furnished his name at the deportation hearing, or from "new fingerprints or handwriting exemplars" which could have been extracted from petitioner at the time of his hearing.

Initially, we note that the evidence used to establish deportability was *not* obtained as a result of Mr. Esquivel

having stated his name at the hearing, or as a result of new fingerprints or handwriting exemplars. It was clearly in the possession of the trial attorney at the time the hearing was commenced. We submit that, at the very least, the Government should have established, *through the testimony of competant witnesses*, the manner in which such evidence was extracted from the files of the Immigration Service. Based upon the Report of the Office of Security of the Central Intelligence Agency which is in the appendix (A. 48-56), and, in particular, the statement appearing at A. 229 to the effect that investigators desiring to check the records of a nonimmigrant must furnish "as much information as possible", it is probable that Mr. Esquivel's files were obtained only as the result of a thorough and detailed interrogation at the time of his arrest. In fact, it is certainly more in accord with *probability*, to speculate that at the time of his interrogation, the Immigration Investigators obtained from Mr. Esquivel a full immigration history which enabled them to immediately locate his file, rather than to speculate that such files were, or could be, obtained on the basis of a name and fingerprints alone.

On page 19 of its brief, the Government alludes to the fact that petitioner testified with respect to alienage at the deportation hearing both in connection with his application for voluntary departure, and in connection with his explanation of his street encounter with Service Officers. With regard to the first point, the Government concedes that under administrative regulations [8 C.F.R. Sec. 242.17(d)], voluntary departure testimony *cannot be used to establish deportability*. With respect to the testimony referred to introduced in connection petitioner's motion to suppress evidence, it is clear that *at no time* did petitioner admit alienage. While it is true that at one point, while being cross-examined by the trial attorney, he did admit that he was "from El Salvador" (A18 at line 18-19), such

admission does not constitute an admission of alienage. A person who is "from El Salvador" can also have been born in the United States, and thus be an American citizen; have been born in El Salvador of American citizen parents, and thus be an American citizen; or have been born in El Salvador and naturalized in the United States, and thus be an American citizen. Accordingly, as distinguished from those cases in which independent evidence of alienage *did* result from a respondent's hearing testimony, [*see, Avila-Gallegos v. INS*, 525 F.2d 666 (2d Cir. 1975)] there is absolutely no evidence in the record, except that which is sought to be suppressed, and that which was introduced in connection with an application for voluntary departure, which can be used to substantiate the Immigration Judge's finding of deportability.

For the reasons previously stated, the testimony introduced in connection with the voluntary departure application is privileged, and the evidence introduced by the Government from its files is tainted and inadmissible as the fruit of an unlawful search and seizure.

IV

IN THE EVENT THE COURT FEELS THAT THE PRESENT RECORD DOES NOT FULLY SUBSTANTIATE PETITIONER'S CONTENTIONS, THE MATTER SHOULD BE REMANDED TO THE IMMIGRATION & NATURALIZATION SERVICE FOR A NEW DEPORTATION HEARING.

In its brief, the Government contends that the record does not establish that there is anything unlawful about petitioner's street arrest and interrogation. Although, for the reasons previously stated, we assert that such illegality *is* clearly established on the record, we also agree that a

complete picture of what transpired was not developed. Similarly, the precise manner in which the Immigration Service located petitioner's previous file was never revealed. In both instances, the record remains unclear only as a result of the refusal of the Service to produce the testimony of the involved officers, and to recognize its obligation to establish the lawfulness of its activities.

If, on the basis of a record which is incomplete, the Court believes that a fully reasoned decision cannot be reached, we respectfully submit that the appropriate remedy would be a remand to the Immigration Service with instructions that the Immigration Judge conduct a full hearing upon petitioner's motion to suppress in which the present inadequacies of the record could be supplemented. This hearing should be *separate and apart* from the deportation hearing. Alternatively, the court could direct that testimony regarding suppression of evidence be heard as part of the deportation proceeding itself, but that such evidence could not be used as part of the Government's Case against petitioner.

It is clear that the procedural confusion which existed throughout the hearing resulted from the absence of any administrative or judicial guidelines concerning the proper manner in which a respondent in deportation proceedings may move to suppress the evidence which the Service seeks to use against him. Such clarification could be derived from an appropriate remand order from this Court.

CONCLUSION

In conclusion, we wish to respond to the frequent, and often unnecessary references in the Government's brief to the fact that the petitioner herein is an "illegal alien". The implication throughout is that the petitioner's status and conduct have rendered him undeserving of the protection of this Court. The Government also alludes to the fact that petitioner "has enjoyed the automatic statutory stay of

deportation provided by Section 106(a) of the Immigration & Nationality Act" [B. U.S.C. Sec. 1105a(a)].

Whether petitioner be labeled as an "illegal alien", or "undocumented immigrant" or by any other term — favorable or unfavorable—he is unquestionably entitled to the protection of the Constitution of the United States, and to the forum which is available to him in this Court by statute. It is also clear that the protection of the constitutional rights of "illegal aliens" who may have been apprehended unlawfully, serves to protect the constitutional rights of citizens who may be mistaken for aliens, and of lawful resident aliens, and, therefore, serves a public interest which goes far beyond the confines of any particular case.

On the basis of the arguments presented herein, it is respectfully submitted that petitioner was detained, arrested, and interrogated, on a public street, in gross violation of his constitutional rights. Accordingly, the evidence used to establish alienage and deportability should have been suppressed, and the order of deportation should be set aside by the Court. In the alternative, it is respectfully requested that the Case be remanded to the Immigration Service for new deportation proceedings during which petitioner would be afforded a more proper hearing in connection with his motion to suppress evidence.

Respectfully submitted,

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BY: Martin L. Rothstein

Dated: September 27th, 1976
New York, N.Y.

FRIED, FRAGOMEN & DEL REY

AFFIDAVIT OF PERSONAL SERVICE

STATE OF NEW YORK,
COUNTY OF RICHMOND ss.:

EDWARD BAILEY being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 266 Richmond Avenue, Staten Island, N.Y. 10302. That on the 29 day of Sept. , 1976 at No. 1 St. Andrews Pl., NYC deponent served the within Reply upon ~~Mx Sxxx~~ Thomas Belote, Asst. U.S. Atty. the Appellee herein, by delivering ~~xxxx~~ 3 true copies ~~xxxx~~ thereof to him personally. Deponent knew the person so served to be the person mentioned and described in said papers as the Appellee therein.

Sworn to before me,
this 29 day of Sept. 19 76

Edward Bailey

WILLIAM BAILEY
Notary Public, State of New York
No. 43-0192563
Qualified in Richmond County
Commission Expires March 30, ~~XXXX~~ 1978

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